United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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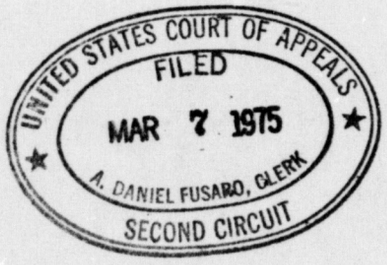
75-2022

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel. WILLIAM H. BANKS, Appellant, -against- ROBERT J. HENDERSON, et al., Appellees.	Docket No. 75-2022

BRIEF FOR APPELLANT
PURSUANT TO
ANDERS v. CALIFORNIA

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
DENYING A WRIT OF HABEAS CORPUS



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QUESTION PRESENTED

Whether there are any non-frivolous issues to be presented for this Court's consideration.

STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

This is an appeal from an order of the United States District Court for the Southern District of New York (The Honorable Marvin E. Frankel) entered on November 19, 1974, denying a petition for writ of habeas corpus. Judge Frankel granted a certificate of probable cause.

This Court granted leave to appeal in forma pauperis, and The Legal Aid Society, Federal Defender Services Unit, was assigned as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

Appellant was arrested in New York County on August 28, 1964, and was subsequently charged in an eight-count indictment with committing assaults and robberies upon six elderly victims, one of whom died as a result of injuries received in the assault. These incidents allegedly occurred between May and July 1964. In 1965 appellant entered a plea of guilty to the reduced charge of manslaughter in the first degree, and he was sentenced to twenty to thirty years in prison. This conviction was set aside in 1968 in a State habeas corpus proceeding on the ground that appellant had not been informed prior to his plea of guilty that

he would be subject to increased sentence by virtue of the fact that he was a prior felony offender. Thereafter, appellant reinstated his plea of not guilty, and was tried in 1971 by a jury before the Honorable Joseph A. Martinis in Supreme Court, New York County.

Prior to the trial in the State court, Justice Martinis held a hearing as to the admissibility of the confessions obtained from appellant on August 28, 1964, the date of his arrest. The police claimed that they had learned of appellant's identity through an address book which a civilian had found at the scene of one of the robberies. This book was turned over to the police, who then obtained photographs of appellant. Two of the victims allegedly saw the photographs and identified appellant as the assailant (H.20, 61-62, 94*).

The hearing record reflects that petitioner was taken into custody at approximately 3:30 p.m., and was thereafter transported to the Tenth Precinct in Manhattan, where he was interrogated (H.9-39, 81-96, 121-121, 166-169, 217).

According to the State's witnesses, appellant confessed on three separate occasions on that day: in the afternoon, soon after arriving at the station house; early that evening when, on a police car tour of the neighborhood, appellant pointed out

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*Numerals preceded by "H" in parentheses refer to pages of the transcript of the pre-trial hearing conducted on January 4 through 11, 1971. **Numerals preceded by "T" refer to pages of the transcript of the trial.**

the precise location of each robbery and described each in greater detail; and at approximately midnight, after being advised of the right to remain silent by an Assistant District Attorney, when he submitted to a record question-and-answer statement which consisted of approximately eighteen pages (H. 20-39, 95-109, 208). The police acknowledged that no Miranda-type warnings (H.40) were given to appellant prior to questioning; however, they denied that appellant's confession was coerced or obtained through the use of force or threats (H.41-42, 109, 169, 217-219).

Additionally, the police testified that appellant at no time requested counsel, nor did he request a call to friends or relatives (H.64, 73, 126, 203).

Appellant testified at the hearing on his own behalf, and vigorously disputed the testimony of the police. Appellant stated that the confession had been induced by police use of force and threats to do him bodily harm (H.254-259, 305-315). He further testified that he had requested counsel, and also demanded the opportunity to call his father in New Jersey, and that both these requests had been denied him by the police (H. 257, 316-317). The Judge resolved the issue of voluntariness in favor of the State, finding that "at no time prior to, during or after the interrogation of the defendant was the defendant threatened, struck, beaten or coerced" (H.343).

The first trial, which commenced in January 1971, ended in a mistrial, the jury being unable to agree on a verdict.

At the second trial, which took place in February 1971, the prosecutor was permitted, over defense objection, to read into evidence the prior sworn testimony of one of the robbery victims who had testified and been subjected to cross-examination at the prior trial. The reason for the witness' unavailability, according to the prosecutor, was that the witness, a resident of Florida, was elderly, had a heart condition, and was recovering from the flu at that time.*

The prosecutor further represented to the court and counsel that he had spoken with the witness' doctor by telephone and that the latter was prepared to testify, if necessary, that a trip to New York at that time would seriously endanger his patient's health (T.237-240).**

Over defense counsel's objection, the prosecutor was permitted to place in evidence certain notes taken by police officers based on the address book which allegedly was found at the scene of one of the robberies but subsequently lost while in the possession of the police.***

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*This was corroborated by the witness' son who had testified earlier in the trial (T.225-226).

**Defense counsel did not dispute the veracity of these statements.

***While no specific objection was claimed at trial, on appeal to the state courts and in the District Court appellant contended that this violated the "best evidence" rule.

Finally, immediately prior to defense summation, the trial judge foreclosed appellant's counsel from commenting on the State's failure to provide a lineup. The record reflects that although there were prior out-of-court identifications made by several of the victims in 1964, the use of these prior identifications was suppressed by the court after a hearing, on the ground that each was the product of an unlawful show-up. Accordingly, the court reasoned that counsel's proposed argument would be misleading, in that the jury would infer that none of the witnesses had been able to identify appellant (T.783-789). However, the trial court did not foreclose counsel from arguing to the jury the total absence of positive courtroom identification of appellant, and this argument was pursued on summation (T.797-809, 893-898, 914-126).

The jury convicted appellant on one count of first degree murder, three counts of robbery in the first degree, and two counts of robbery in the second degree. Appellant was sentenced on March 26, 1971, to life imprisonment on the murder charge, and to concurrent sentences of twenty to thirty years on each robbery conviction as a prior felony offender.

Appellant appealed to the Appellate Division, First Department, which affirmed the conviction without opinion on September 18, 1973. People v. Banks, 42 A.D.2d 926 (1st Dept. 1973). The New York Court of Appeals affirmed without opinion on June 26, 1974. People v. Banks, 34 N.Y.2d 857 (1974).

On the petition for writ of habeas corpus in the District

Court, appellant raised five issues which were raised in the State courts. Appellant asserted that (1) his confessions, which were obtained prior to Miranda v. Arizona, 384 U.S. 436 (1965), were inadmissible at his trial which commenced in 1971 because they were obtained without the requisite warnings concerning his Fifth and Sixth Amendment rights; (2) his confession to the Assistant District Attorney was inadmissible because it was obtained some nine hours after his arrest and prior to his arraignment; (3) he was deprived of his right to confrontation by virtue of the fact that testimony of one of the witnesses at the first trial was read to the jury at the second trial; (4) it was a violation of the "best evidence" rule to admit into evidence notes which were taken by the police based on an address book allegedly belonging to appellant which, prior to trial, was lost by the police; and (5) it was improper to prohibit defense counsel from commenting on the failure of the police to provide a fair lineup.

POSSIBLE ISSUES ON APPEAL

There are three possible legal issues of Federal constitutional dimension* which appellant raises here. The first such issue is whether his confessions, which were obtained in 1964, prior to Miranda v. Arizona, 384 U.S. 436 (1966), and therefore without being advised of his Fifth and Sixth Amendment rights, were admissible at trial in 1971. Johnson v. New Jersey, 384 U.S. 719 (1966), held that Miranda v. Arizona, supra, "applies only to cases in which the trial began after the date of [the Miranda] decision...," which was June 13, 1966, and not to cases which were tried before. Johnson v. New Jersey, supra, 394 U.S. at 721. However, Jenkins v. Delaware, 395 U.S. 213 (1969), held that Miranda does not apply to "retrials" after Miranda where the original trial had begun before Miranda was decided. Appellant attempts to distinguish his case from Jenkins on the ground that Jenkins involved a "retrial," whereas here the first conviction was based on a plea of guilty, and hence the trial in 1971 was the first trial. This factual distinction does not prevent application of Jenkins. As Judge Frankel noted in his opinion below, Jenkins was based on the belief that

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*Appellant's contentions concerning the inadmissibility of the police notes from the lost address book on the "best evidence" rule and the failure to permit comment on the lack of a lineup are matters of State law which, as Judge Frankel stated below, do not raise questions under the Federal Constitution.

> ... [t]he burd[illegible] [on the prosecution] would be particularly onerous where an investigation was closed years prior to a re-trial because law enforcement officials relied in good faith upon a strongly incriminating statement, admissible at the first trial, to provide the cornerstone of the prosecution's case.
>
> Jenkins v. Delaware, supra, 395 U.S. at 220.

On the other hand, the Court's reason for applying Miranda to cases arising before but tried after the decision was that

> ... [t]he commission and investigation of a crime would be sufficiently proximate to the commencement of the defendant's trial that no undue burden would be imposed upon prosecuting authorities by requiring them to find evidentiary substitutes for statements obtained in violation of the constitutional protection afforded by Miranda.
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> Id., 395 U.S. at 22.

There is no logical reason why the rationale of Jenkins would not apply here. United States v. Kienlen, 415 F.2d 557 (10th Cir. 1969).

The second possible issue appellant raises is his contention that his confession to the Assistant District Attorney was inadmissible because it was obtained more than nine hours after his arrest and prior to arraignment. He also maintains that the confession was induced by force and threats of violence, and hence was involuntary. As Judge Frankel properly noted below, the former contention is based entirely on State law. People v. Donovan, 13 N.Y.2d 148 (1963); People v. Wallace, 17 A.D.2d 981 (2d Dept. 1962); People v. Richardson, 25 A.D.2d 221 (1st Dept. 1966). As to the latter contention, while there

was a sharp dispute as to the facts at the voluntariness hearing in the State courts, appellant was afforded a full and adequate hearing on the issue, and the trial court's factual findings, that petitioner was neither threatened nor beaten, are fairly supported by the record. Accordingly, there is no basis for the District Court to reconsider those findings or to grant a new hearing. Townsend v. Sain, 372 U.S. 293, 313 (1963).

Another possible legal issue of constitutional dimension is whether appellant was deprived of his right to confront his accusers, as guaranteed by the Sixth Amendment. Over objection, the trial judge permitted the prosecutor to read into evidence a witness' testimony given at the trial a month earlier which had ended in a hung jury. The Supreme Court, in Mancusi v. Stubbs, 408 U.S. 204 (1972), held that this was permissible where the prior testimony had been subject to cross-examination and the witness was unavailable at the time of trial.

The State court here made a finding that the witness was unavailable. The record reflects that the prosecution made a good faith attempt to obtain the witness' presence. The witness had come up from Florida to testify at the earlier trial which had ended in a hung jury a month earlier. Moreover, according to the representations made by the prosecutor and confirmed by the witness' son, the witness' unavailability was the result of illness. The prosecutor further represented that he had spoken with the witness' physician in Florida, who was prepared to testify, if necessary, that a trip to New York

at that time would endanger the witness' health. Defense counsel at no time disputed the veracity of these statements.

Moreover, the testimony read into the record was subject to cross-examination at the first trial. Thus, it cannot be said that appellant here was deprived of his right to confrontation as guaranteed by the Sixth Amendment.

CONCLUSION

For the above-stated reasons, an order should be entered relieving The Legal Aid Society, Federal Defender Services Unit, as counsel on this appeal, on the ground that there is no non-frivolous issue to be presented to this Court.

Respectfully submitted,

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I certify that a copy of this notice of brief and appendix has been mailed to each of the following:

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